IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL FROM ORDER NO. 62 OF 2005

1. Shri Govind Gopal Poy Raiturkar,
   alias Govind Gopal Poi Raiturkar,
   son of late Gopal Poy Raiturkar,
   aged about 69 years, businessman,
   and his wife;

2. Smt. Nalini Govind Poy Raiturkar
   alias Urmila Govind Poy Raiturkar,
   daughter of late Mahadeva Poi Fondekar,
   aged about 62 years, housewife,

   Both residing at H.No.992,
   Borda, Margao, Goa. 403 602. ..... Appellants/
   Original Plaintiffs

V e r s u s

1. Shri Santosh Ratanji Ramnathkar,
   son of Ratanji Ramnathkar,
   aged about 51 years, advocate and his wife,

2. Smt. Vidya Santosh Ramnathkar,
   daughter of V. B. Kembhabi,
   aged about 47 years, housewife,

   Both residing at H. No. 31,
   Ramnathi, Bandora, Ponda, Goa. ..... Respondents/
   Original Defendants

M. S. Usgaonkar, Senior Advocate with Mr. S. S. Sardessai, Advocate for the Appellants.

U. S. Kolwalkar, Advocate for the Respondents.

CORAM : **N. A. BRITTO, J.**

DATE : ***17.02.2006***

O R D E R

Admit. By consent heard forthwith.

2. The plaintiffs' application for temporary injunction filed in SCS No.134/2005/A, has been dismissed by the Trial Court by Order dated 11.11.2005. Hence this appeal. The plaintiffs were granted earlier in their favour an exparte Order on 07.10.2005, by which the parties were directed to maintain status quo.

3. The plaintiffs and the defendants are adjoining owners. The dispute between them is as regards a strip of land admeasuring 38.75 square metres as shown by the plaintiffs in the plan annexed to the plaint by letters M T D Q. The property of the plaintiffs has been surveyed under Chalta nos. 560 and 561 and that of the defendants under Chalta nos. 791 and 792 of P.T. Sheet no.239 of Margao City Survey.

4. The plaintiffs have sought a declaration to the effect that the

said strip admeasuring 38.75 square metres, being the western most strip of Chalta nos. 791 and 792, forms part of the property of the plaintiffs and the same need to be included within Chalta nos. 560 and 561 and also for permanent injunction to restrain the defendants from carrying out any construction encroaching within or over the plaintiffs' property and particularly within or over the said strip of land of the property of the plaintiffs, which at present, forms the western most part of Chalta nos. 791 and 792 of the said P.T. Sheet no. 239.

5. The plaintiffs' property has a building which has four shops facing the road on the west and five shops facing the road on the south. The last shop on the eastern side of the property of the plaintiffs is shop no.9, which shop touched the western boundary of house no. 580 existing in the property of the defendants and, not only that, this shop no. 9 did not have its eastern wall of its own but the western wall of the defendants' house served as the eastern wall/protection of the said shop no.9 and even the roof of the said shop no.9 rested on the western wall of the said house no. 580 of the defendants. This was the position on the south eastern side of the property of the plaintiffs. As far as the north eastern part of the property of the plaintiffs i.e. on the rear side of the said shop no.9, the

plaintiffs claim that there is a strip of land forming part of the entire property which served as the set back area on the east of the said building of the plaintiffs and which the plaintiffs have styled as the eastern set back area of the property of the plaintiffs. The defendants demolished the said house or old building bearing no. 580 and dug a foundation to lay a footing or column next to the wall of the said shop no.9 of the plaintiffs and not 0.90 metres west where as per the Survey Plan, the property of the defendants extends. The fear of the plaintiffs that their shop no.9 may collapse on account of the digging by four metres next to the said eastern wall of the shop no.9 of the plaintiffs, gave rise to a dispute between both the parties and which was settled by an agreement styled as an Agreement of Settlement of Dispute dated 19.03.2005.

6. Four clauses of the said agreement between the parties are relevant and important and could be summarized. As per Clause 3, the defendants were to construct a dummy/supporting wall to the subject room (shop no. 9 of the plaintiffs) and in respect of the said set back area, the defendants were to simultaneously erect or cause to erect a pucca masonry wall on the boundary between the first property (of the defendants) and the second property (of the plaintiffs) in continuation with the western dead

wall of the proposed new building in the first property (of the defendants). In terms of Clause 4, the defendants were to construct a dead wall of the proposed new building as well as the above said pucca masonry wall on the western boundary of the first property (of the defendants) so that such wall of the new building would serve as the support to the roof of the subject room (shop no.9) and would also serve as a protection for entry of any person or animal into the plaintiffs' property from the eastern side of the plaintiffs' property. In terms of Clause 10, the defendants undertook not to construct any part of their new building or the pucca masonry wall inside or within the area of the plaintiffs' property and not project any part of such building over the plaintiffs' property. In terms of Clause 11, both the parties acknowledged that the boundaries of the respective properties plotted in the City Survey Plan were correct and that there was no dispute about the same.

7. The learned trial Court proceeded on the basis that the Survey Plan (of Chalta no. 791 and 792), had a presumptive value as regards its accuracy and that the plan prepared by the plaintiffs' Engineer, did not have a presumptive value and, therefore, was incapable of rebutting the presumption of the Survey Plan. However, the learned trial Court failed to

note as to how a portion of the shop (0.90m) which belonged to the plaintiffs could be shown as part of the property of the defendants in the absence of any claim whatsoever having made by the defendants in relation to the said shop or part of it. A plan or map is prepared based on possession or occupation but here was a case the plaintiffs could demonstrate exfacie that the plan or map which showed the shop belonging to them and in their occupation as part of the property of defendants was erroneous. There is no explanation from the defendants as to why they chose to leave about 0.90 metres, in case any part of the said shop belonged to the defendants or for that matter, the same was standing in their property, to lay a foundation of the pillar/footing for their new building in line with the eastern wall of the said shop no.9 of the plaintiffs. In other words, the plaintiffs claimed no right over any portion of the property of the plaintiffs as occupied by said shop no.9. This was towards the south eastern side of the property of the plaintiffs. The plaintiffs also claimed no right over the set back area towards the north east of the property of the plaintiffs except to say that they had a door and a window which opened into the said set back area of the plaintiffs or to say that a portion of the roof of their house also projected into it. On the contrary, the defendants entered into the said agreement by which they accepted the position that

the plaintiffs' shop no.9 was deriving support of their then existing house and agreed to continue to extend the said support by virtue of Clause 4 of the said agreement dated 19.03.2005, which in other words, would show that the plaintiffs did not claim any right to the said portion of 0.90 metres, which was as per survey, shown as part of the defendants property and which in fact was occupied by the shop of the plaintiffs. Likewise, the defendants in terms of Clause 3 agreed that they would demolish the left out part of the western wall of the old structure (house no. 580), in the defendants' property and agreed to erect a pucca masonry wall on the boundary between both the properties in continuation with the western dead wall of the proposed new building in the defendants' property. (Emphasis supplied). The plaintiffs have alleged, and in my view rightly, in the absence of production of any plans on the part of the defendants, that the defendants had first got their building plans approved to construct the building in line with the said wall of the shop of the plaintiffs and it is only later they got their plans revised so as to project their building over and above the said shop no.9 of the plaintiffs as well as the said set back area of the plaintiffs lying behind the said shop and on the north eastern side of the property of the plaintiffs. Considering what the parties agreed to by virtue of the said agreement dated 19.03.2005, it appears that both the parties

had in fact not verified their respective properties in the light of the City Survey Plan although it was stated by them in Clause 11 that the boundaries as plotted in the said plan were correct. If the plaintiffs had a shop for over forty years and the said set back area regarding which, the defendants have not put any claim except to say that they had a door and a portion of the roof which opened and projected into it respectively, the defendants, prima facie, could not be entitled either to build on or above the said shop or the said open space/set back area of the plaintiffs and any building on or above the said disputed portion marked by letters M T and D Q on the plan produced by the plaintiffs, would clearly amount to an invasion on the proprietary rights of the plaintiffs. As already emphasised, the defendants had agreed, by virtue of the said agreement dated 19.03.2005, to construct a dead wall along the common boundary in continuation with the western dead wall of the old structure, that being the boundary between both the properties. An injunction is granted in support of a party so as to preserve the property in dispute till the suit is decided on merits. Considering the building plans which the plaintiffs got approved initially and which the plaintiffs claimed they had perused and considering that the plaintiffs chose to erect the column/footing in line with the wall of the said shop no.9 of the plaintiffs and the agreement dated 19.03.2005 and other pleadings of the

defendants, it was abundantly clear that the defendants had no claim over and above the said shop no.9 of the plaintiffs or for that matter, the said set back area, claimed by the plaintiffs as part of their property. Considering the same, it appears that the learned trial Court exercised its discretion not to grant injunction in favour of the plaintiffs erroneously. The said Order, therefore, deserves to be set aside and the plaintiffs deserve to be granted an injunction order in their favour directing the defendants not to carry out any construction on or above the shop no.9 of the plaintiffs on the south east of the property of the plaintiffs as well as on or above the said set back area on the north east property of the plaintiffs. In other words, the defendants are hereby directed to maintain a status quo on or above the said disputed portion as represented by letters M T and D Q on the plan annexed to the plaint. The allegation that the defendants carried out further construction inspite of the Order of this Court dated 22.11.2005, will be dealt separately in MCA-08/2006. CA-328/2005, shall stand disposed of in terms of this Order.

In view of the above, the appeal is hereby allowed and the Order dated 11.11.05 is hereby set aside. No costs.

N. A. BRITTO, J.

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